FILED
JAN 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-848

In the Supreme Court of the United States

CIGARETTES CHEAPER!,

Petitioner,

V.

R.J. REYNOLDS TOBACCO COMPANY

AND

GMB, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Petitioner Cigarettes Cheaper!, a California corporation, has no parent corporation, and no publicly held company holds 10% or more of Cigarettes Cheaper!'s stock.

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ARGUMENT

In its Petition for a Writ of Certiorari ("Petition"), Cigarettes Cheaper! ("CC") asks the Court to address the circuit split created by the Seventh Circuit's misinterpretation of the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13. R.J. Reynolds Tobacco Company ("RJR") tries to recast the Petition as a request to review an evidentiary ruling under Federal Rule of Evidence 403 ("Rule 403"). CC's Petition is nothing of the sort. The Seventh Circuit affirmed the lower court's exclusion of *all* evidence of RJR's ill intent, reasoning that such evidence has little or *no relevance* to either CC's *prima facie* case under § 2(a) of the RPA or the affirmative defenses under that statute. When it decided that ill intent evidence has no probative value, the Seventh Circuit did much more than merely affirm the lower court's miscalculation of the Rule 403 analysis. Rather, the Seventh Circuit rewrote the antitrust laws in contravention of the RPA's plain language, disregarded this Court's precedents, and created a significant split among the Circuits. This Court's certiorari jurisdiction is invoked not to review an evidentiary ruling, but to resolve a split among the Circuits regarding whether subjective intent evidence has any relevance at all under the RPA.

I. THE DECISIONS BELOW REST UPON THE ASSUMPTION THAT INTENT EVIDENCE HAS NO PROBATIVE VALUE UNDER THE RPA, CONTRADICTING THE TEXT OF THE STATUTE AND THE CASE LAW INTERPRETING IT.

While the district court and Seventh Circuit characterized their respective decisions as resting upon Rule 403, neither court in fact engaged in the analysis called for by that rule. As the opinions below reveal, neither court actually weighed the probative value of the intent evidence against its potential for unfair prejudice because both courts first decided that the intent evidence had ***no*** probative value

in the context of an RPA claim. *See* Pet. App. at 11a ("A bad intent is not part of the plaintiff's *prima facie* case under § 13(a) and a "good" intent...does not excuse price discrimination."); *id.* ("Even if marginally relevant to some issue (which we doubt)...[intent evidence] could have played little role beyond confusing jurors[.]"); *id.* ("The district judge should have kept *all* claims about motive or intent out of evidence[.]"); SA885 (the district court on ill intent's relevance: "No, no, I agree [the ill intent evidence] is not relevant to the elements of the claim[.]"); RA 587 ("Ill-will evidence would add little, if any, probative value to the existing evidentiary record."); RA589 ("It is either not relevant or so marginally relevant...as to not override *its* ***probative value****, which is virtually, I think,* ***non-existent.***") (emphasis added).

The legal decision that subjective intent evidence *has no probative value* under the RPA, which predetermines the outcome of any subsequent Rule 403 analysis, is the "Question Presented" in CC's Petition. When an erroneous interpretation of law places one federal Circuit squarely at odds with the other Circuits, a writ is appropriate. The Seventh Circuit's decision that intent evidence has no probative value is incorrect as a matter of law, and this erroneous interpretation of federal law pervades its opinion.

A. RJR Admits Intent Evidence May Be Used To Establish Harm to Secondary-Line Competition.

In its Petition, CC demonstrated that the Seventh Circuit departed from the law of this Court and other federal Circuits in reasoning that evidence of a seller's intent is irrelevant to establishing the requisite threat to secondary-line competition in a *prima facie* RPA case. *See* Pet. at 9-16. RJR concedes, as it must, that intent evidence is relevant to this element of the *prima facie* case: "A seller's acknowledgment that its conduct is causing

competitive harm *obviously* bolsters a claim that such harm occurred." Opp. at 17 (emphasis added). RJR then attempts to distinguish the evidence of its intent to harm CC as "qualitatively different" than that presented in cases such as *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), arguing that evidence of *its intent* to "kill CC" is only relevant if RJR is "aware" it is succeeding in its efforts. SA22; Opp. at 17.[1] But this is not the law. Courts have long recognized that subjective evidence of predatory *intent* may establish the existence or likelihood of competitive harm. *See, e.g., Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 108 (3d Cir. 1992) ("In the absence of market data indicating actual competitive injury, a plaintiff may sometimes substitute evidence of a competitor's predatory intent from which competitive injury can be inferred."); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344 (8th Cir. 1987) (explaining "an illicit intent accentuates the probability that a prohibited consequence will come to pass") (quotation and citation omitted).[2]

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[1] Indeed, RJR undoubtedly *was* aware of the anti-competitive effects its actions had. *See, e.g.*, SA221 ("[O]ne [Von's] store (274) has had the Cigarettes Cheaper! format close down" and RJR's program "undoubtedly helped the process"); SA5 (knowledge that tactics would "Punish," "Hurt," or "Stop" CC); SA22 (knowledge that tactics would "kill them [CC]"); SA35 (tactics would "Kill [CC] On The Beach"); SA189 (plans to "use [CC's] weaknesses to defeat the Cigarettes Cheaper! stores"); SA231 (discriminatory discounts were "the ammo to take these [CC] stores down").

[2] RJR argues that CC should not be permitted to rely upon RPA cases involving primary-line competition decided before *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993), because the Court held in *Brooke Group* that the existence of predatory intent could be established through examination of objective data in primary-line cases (*i.e.*, whether the defendant was pricing below cost). Opp. at 16-17. However, the reasoning in *Barr Labs* and *Henry* with respect to the use of subjective evidence remains valid and applicable to secondary-line cases, despite the holding in *Brooke Group*, because objective measures of predatory intent are not available in secondary-line cases. *See* Pet. at 13-14. The lower federal courts have not developed an

Having admitted that subjective evidence of its anti-competitive intent is relevant, RJR argues the Seventh Circuit was nonetheless justified in affirming the district court's exclusion of the subjective evidence. According to RJR, any error in excluding this evidence was harmless because CC made its *prima facie* case without it. Opp. at 13-15. This assertion, however, misses the point of CC's Petition. The Petition takes issue with the Seventh Circuit's determination that such evidence has no probative value and "could have played little role beyond confusing jurors[.]" Pet. App. at 11a. Other Circuits have established this type of evidence *has* probative value under § 2(a), and the Seventh Circuit is the only Circuit to declare otherwise.

Furthermore, RJR provides no support for the bald assertion that once a plaintiff proffers evidence sufficient to sustain its *prima facie* case, the relevance of additional evidence to strengthen that case is automatically diminished or nullified. Opp. at 10, 14-15. By definition, evidence cannot be excluded as cumulative under Rule 403 if it establishes a new fact. *United States v. Lewis*, 693 F.2d 189, 195 (D.C. Cir. 1982); *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11th Cir. 1986). In this case, the excluded evidence established a new fact that would have strengthened CC's case – *i.e.*, RJR's express goal of putting CC out of business. Thus, while CC may have been able to establish the "competitive injury" aspect of its § 2(a) claim with only objective evidence, the Seventh Circuit's wholesale exclusion of evidence of RJR's intent to cause competitive injury – relevant evidence in this Court and the other federal Circuits – is a misinterpretation of federal law requiring this Court's review.

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objectively measurable evidentiary proxy for determining whether the defendant's actions were predatory in nature. *See* Pet. at 13-15.

B. RJR Ignores the Element of the "Meeting Competition" Defense Requiring That Discriminatorily Lower Prices Be Offered *In Good Faith* and *For the Purpose* of Meeting Competition.

RJR admits its case hinged, in large part, upon its ability to convince a jury that it was "meeting competition" when it offered lower prices to CC's competitors. Opp. at 5. In fact, RJR's Opposition spends *two pages* detailing the voluminous amounts of evidence RJR was permitted to introduce regarding the offers it made to CC's competitors and the reasons for those low-price offers. *Id.* at 2-4. The lengthy presentation of this pivotal evidence exemplifies the problem created by the district court's ruling – while RJR was permitted to introduce evidence of its motivation and intent in offering lower prices to CC's competitors, CC was *not permitted* to introduce evidence rebutting RJR's purported motivation and intent with respect to such offers. Pet. at 3-6; Pet. App. at 11a. And though the Seventh Circuit opined that "[t]he district judge should have kept *all* claims about motive or intent [including RJR's] out of evidence," *id.*, the court failed to recognize the extreme prejudice in allowing one party to present evidence on this element of the defense without permitting the other party to present evidence in rebuttal or to impeach. *Id.* at 12a (calling any such error "harmless").

RJR argues that the inquiry of the meeting competition defense is a wholly *objective* one – that a seller need only establish a general awareness of price competition in a particular market to justify discrimination. *See* Pet. App. at 11a-12a; Opp. at 19-20. Not only is this in contravention to the plain language of the statute, *see* 15 U.S.C. § 13(b) (affording sellers a shield from price discrimination claims provided the lower prices were offered "*in good faith* to meet the equally low price of a competitor") (emphasis added), but it also directly contradicts this Court's precedent. *Falls City Indus. v. Vanco Beverage,*

Inc., 460 U.S. 428, 438-39 (1983). In *Falls City*, this Court explicitly held that the "good faith" aspect of the "meeting competition" defense includes a subjective element "requir[ing] that the seller offer the lower price in good faith *for the purpose* of meeting the competitor's price." *Id.* (emphasis in original). The mere objective existence of a competitor's lower price does not satisfy the statute or justify the discrimination. If CC had been permitted to introduce the evidence excluded by the district court, it would have been clear to the jury that RJR was not acting "in good faith" for the purpose of meeting competition but was instead attempting to "kill CC" – a company that was not even RJR's competitor, but a retail distributor. SA22. Had the Seventh Circuit followed the accepted principle that subjective evidence is relevant to the inquiry under § 2(b), the deception in which RJR engaged by pretending to "meet competition" while instead acting to eliminate CC, would have been exposed. [3]

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[3] Similarly, RJR claims that the inquiry under the "functional availability" defense is a wholly objective one and that the evidence of RJR's subjective intent, as revealed through documents authored by the very individuals making the allegedly "good faith" offers to CC, "would add little, if any, probative value[.]" RA587; Opp. at 7, 24. But the case law establishing this affirmative defense draws no such distinctions or restrictions regarding the "objective" or "subjective" nature of the evidence leading to the conclusion that the discounts were not "functionally available." *See FTC v. Morton Salt Co.*, 334 U.S. 37, 41-43 (1948). Though at trial, as the district court stated, each side had been able "to present its position, in terms of what was done, what was said, and what was offered and was not offered," RA 588, a jury would have examined the purportedly legitimate (objective) offers made by RJR with significantly more scrutiny had the jury been aware of RJR's (subjective) desire to eliminate CC. This Court has long recognized that evidence the lower price was not truly being made available to the disfavored purchaser will preclude application of the "functional availability" defense. *See, e.g., Morton Salt*, 334 U.S. at 41-43.

II. THE SEVENTH CIRCUIT'S DECISION CONTRADICTS THE SETTLED LAW OF THE OTHER CIRCUITS.

RJR's Opposition obfuscates the true meaning and impact of the Seventh Circuit's opinion and strives to make it appear that no circuit split results from that opinion. RJR is incorrect.

A. RJR Fails to Distinguish the Fourth Circuit's Opinion in *Hoover Color v. Bayer*.

RJR mounts its most vigorous assault against the Fourth Circuit's decision in *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160 (4th Cir. 1999). First, RJR claims "*Hoover Color* plainly establishes that acting to meet competition is a complete defense, *regardless* of the seller's intent or motives." Opp. at 20. Yet this is clearly not so. As RJR acknowledges in the very next sentence of its brief, a factual question about the seller's motive drove the Fourth Circuit to hold the seller was *not* entitled to the defense as a matter of law. Opp. at 20. Thus, the Fourth Circuit's *Hoover Color* decision plainly establishes that a seller's intent or motive is of significant probative value in applying § 2(b) of the RPA. Second, RJR reads *Hoover Color* to establish the principle that so long as "some evidence" shows the seller was matching a competitor's price, "the meeting competition defense prevails, even if the seller had additional reasons for lowering its price." Opp. at 21. Were this true, *Hoover Color* would have been decided the other way. The Fourth Circuit specifically cited "some evidence" in support of the seller's argument that it was just matching a competitor's price, *Hoover Color*, 199 F.3d at 166, and referred to evidence of the seller's "additional reasons" for lowering its prices – reasons unrelated to price competition – to divest the seller of the judgment it obtained in the district court under § 2(b). *Id.* at 167-68.

Finally, RJR argues *Hoover Color* is inapposite because "the evidence here concededly showed that RJR

was matching Philip Morris's prices." Opp. at 21. Of course the evidence in this case showed as much because the Seventh Circuit, based on a misinterpretation of § 2(b), excluded all evidence to the contrary, deeming irrelevant RJR's intent to discriminate in price in order to "defeat the Cigarettes Cheaper! stores." SA189. The Seventh Circuit thus dismissed evidence of an "alternative motive," which the Fourth Circuit would find *highly relevant* to the "meeting competition" defense. *Hoover Color*, 199 F.3d at 164, 167. In attempting to distinguish *Hoover Color*, then, RJR emphasizes the Seventh Circuit's conflict with appellate jurisprudence under § 2(b) of the RPA.

B. RJR Barely Addresses the Eleventh Circuit's Opinion in *Alan's of Atlanta v. Minolta*.

RJR devotes only a footnote to *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). Opp. at 21 n.5. In *Alan's of Atlanta*, the Eleventh Circuit noted that the plaintiff had disputed the defendant's claims regarding its "good faith" effort to meet the grey market competition, but that the district court had accepted the defendant's "testimony in toto" and ignored the plaintiff's disputation (much in the same manner that CC's proffered evidence was deemed irrelevant and inadmissible by the district court). *Alan's of Atlanta*, 903 F.2d at 1424-25. Among the inquiries cited by the Eleventh Circuit as posing genuine issues of fact for the jury to consider were "the good faith nature of the alleged investigation Minolta made into grey market conditions, the propriety of its rather generalized response to the purported competition, and the actual *purpose* which lies behind its price discrimination." *Id.* at 1425 (internal citations omitted). In reversing the grant of summary judgment, the Eleventh Circuit, in contrast to the Seventh Circuit, held that evidence of the defendant's actual intent or purpose in discriminating among retailers is relevant to whether it has established the "meeting competition" defense. In attempting to distinguish *Alan's of Atlanta* on the basis that it involved

summary judgment instead of a jury trial, RJR fails to recognize that the substantive holding of *Alan's of Atlanta* – that intent evidence is relevant to the "meeting competition" defense given the "good faith" aspect of § 2(b) – remains constant irrespective of whether the case is being considered by the court on summary judgment or by a jury at trial. *Id.* Thus, despite RJR's contention to the contrary, *Alan's of Atlanta* illustrates the circuit split created by the Seventh Circuit.

C. RJR Disregards the Continuing Validity of the Relevant Portions of the Eighth Circuit's Opinion in *Reeder-Simco GMC. v. Volvo.*

RJR's attempt to distinguish the Eighth Circuit's decision in *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), *rev'd on other grounds*, 546 U.S. 164 (2006), also falls short. *Reeder-Simco*, a secondary-line case, holds that evidence of a defendant's intent can be used to prove the competitive injury element of the *prima facie* case. *Id.* at 711. To establish a *prima facie* case under § 2(a) of the RPA, a plaintiff is allowed to introduce "evidence that disfavored competitors lost sales or profits as a result of the discrimination" or the defendant *wanted* to eliminate certain dealers by reducing those dealers' sales and profits. *Reeder-Simco*, 374 F.3d at 711-12. As the Eighth Circuit recognized in *Reeder-Simco*, one way of implementing a plan to reduce the number of dealers is to cause losses for the disfavored dealers, and "the jury could properly infer Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Id.* at 712. This is the same inference that CC was entitled to present to the jury by way of the subjective evidence of RJR's intent – *i.e.*, that RJR's goal of eliminating CC led to illegal discrimination under the RPA.

RJR's attempt to distinguish this case amounts to little more than the assertion that *Reeder-Simco* is "substantively identical to, and no more relevant than,

Perkins." Opp. at 18. *Perkins*, however, a Supreme Court case establishing the relevance of subjective intent evidence to a *prima facie* case under § 2(a) of the RPA, *is highly relevant* to the inquiry at hand. *Perkins*, 395 U.S. at 649; Pet. at 12-13. The fact that the Eighth Circuit is still following *Perkins* nearly forty years after the decision was rendered (and despite more recent decisions concerning the value of similar evidence in *primary-line* cases), reflects not only the continuing vitality of the *Perkins* opinion, but also the circuit split the Seventh Circuit provoked in this case.

RJR's only "legal" argument against *Reeder-Simco* is that it was "reversed by this Court." Opp. at 18. CC, however, acknowledged this reversal in its Petition, *see* Pet. at 13 n.5, 24-25, noting that this Court made clear it was reversing the Eighth Circuit's decision solely on a basis inapplicable to this case, namely that the RPA did not reach a particular competitive situation. *Volvo Trucks N. Am., Inc. v. Reeder-Simco, Inc.*, 546 U.S. 164, __, 126 S. Ct. 860, 870-73 (2006). Moreover, the Court's comment in that opinion regarding a company's discretion to control the size of its dealer network (cited by RJR) has no application to the circumstances of this case or effect upon the basic premise that competitive harm may be inferred from an intent to *eliminate* a buyer of one's products. Thus, this Court's *Volvo Trucks* opinion leaves undisturbed the Eighth Circuit's conclusion that a seller's predatory intent is relevant to the "competitive injury" aspect of § 2(a) – a principle the Seventh Circuit ignored in this case.

CONCLUSION

The Seventh Circuit's opinion in this case evinces a fundamental misunderstanding of the RPA, and review is needed to ensure the integrity of the statute's plain language, to preserve this Court's precedent, and to resolve this newly-created split between the federal Circuits on an important question of antitrust law.

Respectfully submitted,

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